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Supreme Court of the United States

October Term, 1974
No. 74-261

C. R. FEDRICK, INC., a Corporation
Petitioner

vs.

THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA
Respondent

PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	
I. PETITIONER IS NOT PRECLUDED FROM RAISING THE CONSTITUTIONAL QUESTIONS PRESENTED BY IT HEREIN. SUCH QUESTIONS WERE PROPERLY RAISED IN THE CALIFORNIA COURTS	1
II. SECTIONS 6384 AND 6007.5 OF THE CALIFORNIA REVENUE & TAXATION CODE ..... ARE UNCONSTITUTIONAL	8
III. REVENUE AND TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES... . . .	10
CONCLUSION	14

TABLE OF AUTHORITIES

Page

Cases Cited:

People v. Baldwin, 278 Ill. App. 327,333 . . 5

Burns v. Ross, 190 Cal 269,276 (212 P 17) . . 5

People v. Davies, 35 Ill. 168 (188 NE 337,340) 5

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U S 95,99, 62 S.Ct. 1,3, 86 L.Ed. 65 12

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U S 339, 88 S. Ct. 2173 (1968) 11

General Electric Co. v. State Board of Equalization, 111 C A 2d 180, 244 P 2d 427 . . 6,7

King v. State Board of Equalization (1972), 22 C A 3d 1006,1014 6

Moses Lake Homes v. Grant County (1961), 365 U S 744,751, 81 S.Ct. 870 6,7,9,10

Phillips Chemical Co. v. Dumas Independent School District (1960), 361 U S 376,387, 80 S.Ct. 474 6,7,9,10

People v. Ross (1961), 198 C A 2d 723 . . . 4

Standard Oil Co. v. State Board of Equalization (1965), 232 C A 2d 91,96, 42 C Rptr 543 6,7

People v. Ward, 89 Cal App 2d 467,471 (200 P 2d 867) 4

Texts:

4 Cal Jur 2d Sec. 483, p. 317 5

24 C J S, Sec. 1846, p. 704 5

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ARGUMENT

I

PETITIONER IS NOT PRECLUDED FROM RAISING THE CONSTITUTIONAL QUESTIONS PRESENTED BY IT HEREIN. SUCH QUESTIONS WERE PROPERLY RAISED IN THE CALIFORNIA COURTS.

Reference is made on page 7 of Respondent's Opening Brief (hereinafter ROB) to Sections 6932 and 6933 of the California Revenue & Taxation Code (hereinafter R & T Code).

Section 6932 provides that no suit or proceedings shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally determined or collected unless a claim for refund or credit has been duly filed with the State Board of Equalization.

Section 6933 is quoted as follows:

"6933. Action for Refund; limitation. Within 90 days after the mailing of notice of the Board's action upon a claim filed pursuant to Article 1 of this Chapter, the claimant may bring an action against the Board on the grounds set forth in the claim in a court of competent jurisdiction in any city or city and county of this state in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.

"Failure to bring action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments."

Paragraph 3 of Petitioner's Claim for Refund stated:

"Items of machinery and equipment were installed by this taxpayer for the use of the United States Government at various locations in the State of California, Use and Sales Tax being paid due on an erroneous interpretation of Rule 12 of the State Board of Equalization." (C.T. page 5).

Under a liberal construction, this claim could be

construed as permitting the raising of the constitutional issues raised herein, but in any event, in the complaint which petitioner filed in its action for refund upon denial of Petitioner's claim by Respondent, the Petitioner claimed that the items in question constituted "machinery and equipment", hence exempt under the express provisions of Regulation 1615 (formerly Rule 12) of the Respondent, and particularly that provision relating to "machinery and equipment" which is as follows:

> "Tax does not apply to sales of 'machinery and equipment' to contractors or subcontractors. ..." (Page 38 of Appendix to Petition).

And in the Trial Court's Findings of Fact and Conclusions of Law (pages 25 to 34 of the Appendix to Petition) the Trial Court found as a fact that the items in question were machinery and equipment.

However, the contention was made by the Respondent herein (hereinafter "State Board") as stated by the California Court of Appeal, in outlining the contentions (pages 5 and 6 of Appendix to Petition) as follows:

> "1. Board contends that the use of Fedrick for various items of tangible personal property in the performance of the contract with the United States Government for the construction of improvements to California real property was a taxable use under Sections 6384, 6094, and 6202 (R & T Code)."

This statement of the State Board's contentions clearly in-

vites scrutiny as to the constitutionality of said Section 6384, R & T Code.

Furthermore, the language of the letter from the California Court of Appeal requesting additional argument quoted on page 6 ROB expressly invited argument on this point as follows:

> "That is to say, does Revenue & Taxation Code Sec. 6384 violate the sovereign authority of the Federal Government?"

It is well settled under the law of California that an Appellate Court may decide a case on any point that its proper disposition may seem to require, whether or not such claim is argued.

In the case of People vs. Ross (1961), 198 C A 2d 723, the Court held that failure to prove an essential element of the corpus delecti though not raised in the briefs was a fatal defect and reversed the judgment of conviction even though the point had not been raised in the briefs. The Court says at page 730 of the Opinion:

> "The fact that counsel has not presented the specific point upon which this decision turns cannot deter us from seeing that justice is done. In People v. Ford, 89 Cal App 2d 467, 471 (200 P 2d 867), it is said: 'Although the briefs filed by the present counsel of appellant, who did not represent him at the trial, do not raise the ques-

tion of misconduct, we cannot ignore it. The mere oversight of the attorney for an accused to present a serious claim of error which is justified by the record furnishes no excuse for the perpetuation by the reviewing court of an obvious injustice. Its duty to see that the substantial rights of the accused are protected may not be thus circumscribed.' (6) People v. Davies, 354 Ill. 168 (188 N.E. 337,340): 'The rule, however, that the alleged errors of the trial court not argued or called to the attention of the Appellate Court will be held to have been waived and cannot be raised for the first time in this court is not an unbending rule. If this court can see that grave injustice has been done by the conviction of the defendant, it will review the evidence.'

"People v. Baldwin, 278 Ill. App. 327,333: 'While, generally, a reviewing court will only consider alleged errors argued or brought to the attention of the court, the rule is not inflexible; and where it is apparent that its application will result in injustice, it will not be blindly followed. (See also 4 Cal Jur 2d Sec. 483, p. 317: 24 CJS Sec 1846, p. 704.) This is but an application of the rule frequently applied on the civil side. See Burns v. Ross, 190 Cal 269, 276 (212 P 17).

"Judgment and order reversed."

In the Supplemental Brief filed by the Petitioner herein in response to the invitation from the California Court of Appeal, the following points, among others, were made:

"II. REVENUE & TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES.

"A. THIS SECTION DISCRIMINATES UNCONSTITUTIONALLY AGAINST THE UNITED STATES AND THOSE WITH WHOM IT DEALS.

"B. REVENUE & TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES BECAUSE THE FEDERAL GOVERNMENT BEARS THE INCIDENCE OF THE TAX ASSESSED UNDER SECTION 6384."

In support of proposition II A, Petitioner herein cited the case of Phillips Chemical Company vs. Dumas Independent School District (1960), 361 U S 376, 387, 80 S. Ct. 474, and Moses Lake Homes v. Grant County (1961), 365 U S 744,751, 81 S.Ct. 870.

In support of proposition II B, above, Petitioner herein cited and relied upon the following cases, among others: First Agricultural National Bank vs. State Tax Commission (1968), 392 U S 339,347, 88 S.Ct. 2173; Standard Oil Company vs. State Board of Equalization (1965), 232 C A 2d 91,96, 42 C Rptr 543; King vs. State Board of Equalization (1972), 22 C A 3d 1006, 1014.

In its Petition for rehearing to the California Court of Appeal, the petitioner herein drew the Court's attention to the inconsistency of its opinion herein when contrasted with the care of General Electric Co. vs. State

Board of Equalization, 111 C A 2d 180, 244 P 2d 427 (1952), and to the case of Standard Oil Company vs. State Board of Equalization, 232 C A 2d 91, 43 C Rptr 543 (1965), discussed at pages 15 to 19 of Petition herein.

In petitioner's Petition for Hearing in the Supreme Court of California, the following points were raised:

> "THE COURT OF APPEAL OPINION IS CONTRA TO LONG STANDING DECISIONS AND ITS FAILURE TO DISTINGUISH BETWEEN THE SALES TAX AND THE USE TAX RESULTS IN AN UNCONSTITUTIONAL DISCRIMINATION AGAINST THE FEDERAL GOVERNMENT AND THE PERSONS WITH WHOM IT DEALS."

In support of this proposition, Petitioner cited the Standard Oil case, the General Electric case, all supra.

> "THE OPINION HERE, IF PERMITTED TO STAND, WOULD CONSTITUTE AN UNCONSTITUTIONAL DISCRIMINATION AGAINST THE FEDERAL GOVERNMENT AND THOSE WITH WHOM IT DEALS."

In support of this proposition, Petitioner cited and discussed the case of Phillips Chemical Co. and Moses Lake Homes, supra, as well as the General Electric case and the following sections of the R & T Code: 6381, 6384, 6007.5 and Regulations 1521 and 1615 of Title 18 of the California Administrative Code (Formerly Rules 11 and 12).

Accordingly, it is respectfully submitted that the contentions of the Petitioner herein have been properly submitted to and considered by the California courts.

II

SECTIONS 6384 AND 6007.5 OF THE CALIFORNIA REVENUE & TAXATION CODE AND SECTIONS 1521 AND 1615 OF THE CALIFORNIA ADMINISTRATIVE CODE AS INTERPRETED AND APPLIED BY THE RESPONDENT BOARD ARE UNCONSTITUTIONAL AND DISCRIMINATORY AGAINST THE FEDERAL GOVERNMENT.

Division II (pages 8 to 22 ROB) is an excellent example of circular reasoning.

The Respondent quotes those provisions of Ruling 11 and Ruling 12 (respectively Section 1521 and 1615 of Title 18 of the California Administrative Code) and concludes that the inconsistencies between the treatment accorded to construction contractors for individuals or the State of California on the one hand, and construction contractors dealing with the Federal Government on the other, are required by Section 6384 of the R & T Code and then states (page 11 ROB) that:

> "Section 6384 is not designed to discriminate against the United States or its contractors. It is designed to define the limits of the statutory exemption granted to the United States by California. It does not have any bearing on or relation to the United States constitutional tax exemption of the United States Government ..."

It is respectfully submitted that even if the design of this statute was to define the limits of the statutory exemption which the State of California was willing to grant to the United States Government, nevertheless that does not foreclose scrutiny by this Court of the statute in the context of the United States Constitution and laws thereunder.

The language quoted above would appear to lead to the conclusion that the State of California has the power to tax United States Government and its instrumentalities and agencies without regard to the supremacy clause of the United States Constitution, Section 107 of the "Buck Act" (Title 4 USC Sec. 107), and without regard to those cases, particularly Phillips Chemical and Moses Homes, supra, holding that any action of a state discriminating against the Federal Government is void and unconstitutional.

This entire Division II of Respondent's opposing brief begs the questions raised by Petitioner herein.

Respondent has skillfully attempted to avoid, and does not answer, the basic arguments of Petitioner, which are simply stated as follows:

1. This case involved (among other items) a standby electric generator designed to furnish an alternate power source for airport runways which was housed in a building specifically built and designed for the purpose of housing the generator.

2. In the General Electric, supra, case the turbine generator involved there was housed in a building constructed especially for that purpose.

3. In General Electric, the California court held that the installation of the generator constituted a sale to Pacific Gas & Electric Company and hence was subject to sales tax.

4. Section 6384 R & T Code attempts to levy a use tax upon the contractor and not a sales tax, because to impose a sales tax on the United States Government or its instrumentalities or the persons with whom it deals is beyond the power of the state.

5. Therefore, identical transactions are sales under the General Electric case when made to an individual, private corporation, or to the State of California or any of its subdivisions, but a use subject to use tax when made to the United States Government or those with whom it deals.

6. This constitutes an impermissible and unconstitutional discrimination prohibited by the Phillips Chemical and Moses Homes, supra, and by the supremacy clause of the United States Constitution.

III

REVENUE AND TAXATION CODE SECTION 6384 DOES VIOLATE THE SOVEREIGN AUTHORITY OF THE UNITED STATES BECAUSE THE FEDERAL GOVERNMENT DOES BEAR THE LEGAL INCIDENCE OF THE TAX.

In this division of Respondent's opposing brief, the Respondent seeks to undermine the decision of this Court in the case of First Agricultural National Bank of Berkshire County vs. State Tax Commission, 392 U S 339, 88 S.Ct. 2173 (1968) by citing a number of California cases which hold that the "legal incidence" of the sales tax is on the retailer.

However, it is respectfully submitted that this Honorable Court is in no sense restricted by any characterizations by the California courts as to the nature of the tax, nor its "legal incidence". That question was settled by the First Agricultural National Bank case where it was expressly held that this Court is not bound by any state court's characterization of a sales tax and that this is a determination which this Court is free to make.

Mr. Justice Black, speaking for the Court, says at page 2177 of the Opinion as reported in the Supreme Court Reporter:

> "... Because the question here is whether the tax affects Federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax (citations) and essentially the same question for us is: On whom does the incidence of the tax fall? (Citations)."

The Court then goes on to hold that:

> "(6,7) It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon

the purchaser. See Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U S 95,99, 62 S.Ct. 1,3, 86 L.Ed. 65. Subsection 3 of the Massachusetts sales tax provides:

> "'Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.' Acts and Resolves, 1966, c. 14, Sec. 1, subsec. 3. (Emphasis added.)

"This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. And this interpretation is reinforced by subsection 23 which prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling.

And it seems clear to us that the force of the law, especially the language in subsection 3, is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written.

"(8) For these reasons we reverse and hold that appellant is immune from both the Massachusetts use and sales taxes.

"Reversed."

The provisions of the Massachusetts sales tax statutes referred to in the opinion would appear to be substantially identical with the provisions of the R & T Code set forth at pages 58 to 61, inclusive, Appendix IV to Petition.

Section 6052 requires the retailer to collect the tax from the consumer insofar as it can be done. Section 6052.5 sets up the sales tax reimbursement schedule clearly evidencing an intent upon the part of the Legislature that the tax be collected from the customer. Section 6053 makes it a misdemeanor for the retailer to advertise or hold out that the tax will be assumed or absorbed or refunded. Section 6054 provides that the Board may require a separate statement by the retailer to the consumer of the tax. Section 6054.5 provides that the customer may recover from the retailer any tax in excess of the correct amount.

CONCLUSION

For the foregoing reasons and for all of the reasons urged in its Petition, Petitioner respectfully renews its request for the issuance of a Writ of Certiorari herein.

Dated this 9th day of January, 1975.

Respectfully submitted,

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PROOF OF SERVICE

State of California)
County of Riverside)ss

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of 18 years and not a party to the within entitled action; my business address is 1509 N. Main, Santa Ana, California.

On January , 1975, I served the within PETITIONER'S REPLY TO RESPONDENT'S OPPOSING BRIEF on the interested parties in said action by placing three (3) true copies in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Ana, California, addressed to:

Philip C. Griffin
Office of the Attorney General
600 State Building, 217 W. First St.
Los Angeles, California 90012

I CERTIFY under penalty of perjury that the foregoing is true and correct.

Executed on January , 1975, at Santa Ana, California.

JACK GALLAGHER